

William J. Rorabaugh
Expert Witness Report

Costco Wholesale Corporation v. Hoen, et al.
No. CV04-0360P

June 2, 2005

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1. I am Professor of History at the University of Washington, where I have taught since 1976. After getting my A.B. in History (Honors) from Stanford University (1968), I received my M.A. (1970) and Ph.D. (1976) in American History from the University of California, Berkeley. My dissertation was a history of American drinking between 1790 and 1840. It was published as *The Alcoholic Republic: An American Tradition* (New York: Oxford University Press, 1979). Reissued in paperback in 1981, it remains in print.

2. I am primarily a social historian of the early nineteenth century and of the 1960s, both periods of rapid social change. I am the author of four scholarly books, two textbooks, 21 scholarly articles (nine on alcohol), 26 encyclopedia articles (12 on alcohol), and 54 book reviews (18 on alcohol). Although I have published extensively in many areas of American history, my interest in alcohol history has been strong since the beginning of my career. Recent works include "Drinking in the 'Thin Man' Films, 1934-1947," *Social History of Alcohol and Drugs*, vol. 18 (2003), pp. 51-68, and two articles on alcohol consumption in Jack S. Blocker, Jr., ed., *Alcohol and Temperance in Modern History: An International Encyclopedia* (Santa Barbara: ABC-CLIO, 2003), 1:18-21, 23-24.

3. I am a past president of the Society for Historians of the Early American Republic; I have been on the editorial boards of the *Journal of the Early Republic* and

DEFENDANT'S
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History of Education Quarterly. Since 2003 I have been Managing Editor of *Pacific Northwest Quarterly*. I am a board member of the Alcohol and Temperance History Group. I have served as a peer reviewer for articles and book manuscripts (many concerning alcohol) for 13 History journals and 13 university presses; and I have participated at 56 historical conferences since 1985 (21 sessions concerning alcohol). I have reviewed grant proposals for the National Humanities Center; for the National Endowment for the Humanities (NEH); for the National Institute of Alcohol and Alcohol Abuse (NIAAA), a subdivision of the National Institutes of Health (NIH); and for alcohol history proposals submitted to the Australian Research Council.

4. I have held major fellowships from the National Endowment for the Humanities and from the National Humanities Center, as well as smaller awards from the Washington State Alcohol Institute, the Newberry Library, the Henry E. Huntington Library, and the John F. Kennedy Library. In Fall 2004 I was Visiting NEH Distinguished Professor at the University of Richmond in Virginia.

5. I have never been an expert witness in a court case, but in 2003 I did provide a deposition in a University of Washington employment case that was dismissed prior to trial.

6. My opinions in this case are based upon my broad knowledge of the alcohol field and its literature, especially historical literature, going back more than thirty years; the specific research that I have undertaken for the book and subsequent articles that I have written; my reading of manuscripts for presses, of proposed articles for journals, and of grant proposals to grant agencies; books about alcohol that I have reviewed; sessions about alcohol that I have attended at scholarly meetings; and historical materials provided

to me in this particular case. The focus of the research for this case has been on the general state of alcohol sales and use prior to Prohibition, the situation during Prohibition, and especially the situation just after Repeal in 1933. Particularly, I have examined materials about the federal and Washington State statutes and policies that were adopted circa 1933-1935. The legal framework for alcohol sales established at that time is especially pertinent to this case because it remains the framework used today. Furthermore, discussion in the 1930s shows the particular considerations that led to the specific sales framework that was adopted.

7. My billing rate for research, evaluations, and review of materials relevant to this case is \$150 per hour, plus expenses. Time to prepare for and in depositions and testimony will be \$250 per hour.

8. My opinions are subject to change as the work proceeds.

9. Alcohol is different. Throughout American history alcohol has been widely recognized as dangerous. Its retail sale was licensed even in colonial times. As the country urbanized and industrialized in the 1800s, alcohol was blamed for many social ills. Alcohol produced much controversy, and as an alternative to regulation, the movement to ban alcohol began in the 1830s. For the next eighty years the issue of whether alcohol should be regulated or prohibited was fought out in the political arena. Effective regulation, however, never existed in this era.

10. In the United States in the late 1800s and early 1900s, powerful, vertically integrated distillers and brewers controlled production, distribution, and retail sales through exclusive sales outlets. Brewers and distillers forced these "tied houses" to push

sales, and in this brutally competitive market, desperate saloonkeepers doctored merchandise, served children, catered to drunkards, offered backroom gambling and prostitution, and played key roles in corrupt political machines. The Anti-Saloon League succeeded in getting national Prohibition adopted largely by attacking the saloon, which had few defenders.

11. National Prohibition, which lasted from 1917 to 1933, had its own problems: No alcohol taxes, expensive enforcement, dangerous illegal liquor, and rampant organized crime. By 1933 most Americans had concluded that Prohibition had been a mistake. Americans, however, did not want to return to the pre-Prohibition era, because they feared the reemergence of the "tied-house" saloon. In 1933 most people wanted a new system of *effective* government regulation, and they believed that the solution to the problems posed by alcohol was to be found through a combination of federal and state government regulation and taxation. Effective regulation would mean efficient collection of alcohol taxes (which were sorely needed during the Depression), federal and state control over the industry, and prevention of the reemergence of the saloon by banning "tied houses."

12. The key to effective regulation in 1933 was laid down in the Twenty-first Amendment, which did not merely repeal the earlier prohibitory Eighteenth Amendment. Instead, the Twenty-first Amendment gave the states rather than the federal government special powers with reference to alcohol. Because alcohol was involved in interstate commerce, the federal government had a role in regulation, but Prohibition had demonstrated that attitudes and habits about alcohol varied widely around the United States. Local public opinion mattered, and it made sense to encourage states to regulate

alcohol according to local views. In 1933 some states wanted to remain totally dry. Other states were prepared to allow legal alcohol sales, but only for off-premise consumption, that is, home use. Some states wanted to treat spirits and beer differently, and some did not. The Twenty-first Amendment recognized these local variations by emphasizing state regulation. States were given wide latitude in how they chose to regulate alcohol, and they could continue to prohibit alcohol knowing that the federal government, under the Twenty-first Amendment, would keep alcohol from entering a dry state.

13. Franklin Roosevelt's New Deal marked the 1930s. The decade was one of great experimentation in government, and this experimentation extended to the state regulation of alcohol. After Repeal in 1933, the states recognized that alcohol was a unique product that had to be subjected to strong state control lest there be a return either to the evils that prevailed before Prohibition or to the evils that prevailed during Prohibition. Wet states had strong regulatory statutes that usually included a powerful state alcohol control board. State boards often determined the number of sales outlets. This was not an easy task. If too few were licensed, the result would be unlicensed and untaxed outlets. If too many were licensed, the result would be impoverished licensees who would sell to underage drinkers in order to make a living. The end of bootlegging and the collection of state taxes were also important goals.

14. The most important innovation in the new alcohol distribution and sales system set up in all wet states in 1933 was the separation of producers, distributors, and retailers into a three-tier sales distribution system. States adopted this system for several reasons. First, the three-tier system was a common form of business organization in many

industries in the 1930s. Second, and probably more important, the states were determined in their statutes and regulations to prevent the return of the pre-Prohibition "tied house" saloons, which had been so widely discredited. The distributor insulated the retailer from the power of the producer. The distributor also insulated the producer from the power of the retailer. Although the idea of the distributor as an insulation shield was discussed in the alcohol literature prior to Repeal, it should be noted that alcohol distributors did not invent the three-tier system: At the time this system was created alcohol distributors did not yet exist. It is also important to note that the states did not create the three-tier system for the benefit of distributors. Instead, the states believed that distributors would help ensure that government was more powerful than the alcohol trade by preventing the vertical integration of the "tied house" era before Prohibition.

15. Third, the existence of distributors made it easier for national producers to follow varied state laws. Fourth, states found that distributors could reduce state costs by helping to collect taxes. Fifth, states required national producers to use state-licensed distributors to ensure conformity. Without state-based distributors, small producers would find it difficult to market in multiple states. Also, without distributors, small producers could not monitor thousands of retailers that handle their products. Sixth, although little noted at the time, over the next seventy years it was gradually realized that distributors promoted consumer choice, especially enabling small producers to place merchandise with retailers.

16. Finally, the National Recovery Act (NRA) also played a rôle in establishing the three-tier system. In early 1933 beer became legal by federal statute under the still existing Prohibition Amendment. At about the same time the federal government, to

fight the Depression, organized the NRA. Brewers voluntarily adopted an NRA Code, which recognized the three-tier system. In December 1933, when Repeal went into effect, the remaining parts of the alcohol industry adopted NRA Codes, which were also organized around the three-tier system. In addition, NRA Codes routinely provided for wage and price stability, including mechanisms to maintain prices. During the Depression declining prices caused severe problems, because while prices declined, debts did not.

17. When Repeal took place in late 1933, Washington, like other states, adopted a three-tier system in the statute that it passed to regulate alcohol. From the historical evidence, it seems clear that one main reason for Washington's three-tier system was to prevent the return of unwanted and unsavory "tied house" saloons that had been widespread before Prohibition. There was much hostility to saloons in the state, as evidenced by the fact that this statute did not allow spirits to be sold by the drink. The statute also meshed with the three-tier system in then existing NRA Codes, and Washington also adopted stable pricing policies that were consistent with the NRA Codes. While Washington, like thirteen other states, adopted a state monopoly for both distribution and retail sale of spirits for off-premise consumption, Washington licensed private beer distributors and retailers for both on-premise and off-premise consumption. Wine followed a more complicated path that eventually resulted in a mixed system with private wine distributors who supplied on-premise sales and with off-premise retail wine sold in both state and private stores. Although Washington chose to handle spirits, beer, and wine differently, in all three cases the state employed the three-tier system. Even when the state acted as both monopoly distributor and retailer, as it did in the case of

spirits, the state still maintained separate distributor and retailer functions. State stores did not order directly from producers but through the state distributor system.

18. After the U.S. Supreme Court ruled a portion of the NRA unconstitutional in 1935, the Federal Alcohol Act (1935) reenacted many NRA Code provisions, including the three-tier system. To this day, states use the three-tier system. They do so because the three-tier system has promoted efficient tax collection, effective regulation of an inherently dangerous product, stable sales practices, consumer choice, and moderate drinking. The system has avoided excessive retail competition that would lead to illegal sales to minors or other inappropriate persons (e.g., those visibly drunk). Compared to the NRA Codes, the 1935 federal statute left more responsibility with the states, as envisioned by the Twenty-first Amendment.

19. Because alcohol is dangerous, it needs to be regulated with prudence. The history of alcohol regulation in Washington since 1933 shows that regulation has been effective. Preventing retailers from dealing directly with suppliers has made tax collection and enforcement less expensive and less difficult. Banning direct sale from suppliers to retailers has helped small-scale retailers whose business is insufficient to be of direct interest to many producers. Even if direct sales from producers to retailers were allowed, such small retailers would have to continue to buy from distributors. However, if distributors lose their largest customers to suppliers' direct sales to retailers, distributors will have to charge higher prices to their remaining customers, the small retailers. Then, compared to large retailers, small retailers will end up paying high prices for the goods that they sell. For the historian, this result appears strongly to resemble the situation that prevailed in the decades before Prohibition. As profit margins were

threatened, saloonkeepers were driven to sell desperately and illegally. On the other hand, we can observe from the experience with effective regulation in the past seventy years that if a retailer can count on predictable, steady profits (the predictability is more important than the size) in a regulated environment, then the retailer has a compelling reason not to engage in activity that would risk the license. Effective regulation, in other words, promotes responsible retailing, which encourages moderate drinking.

20. From a historical perspective, the creation of market instability through excessive competition among retailers is not in the public interest due to the inherent dangerous nature of alcohol. The United States traveled down that road in the years before Prohibition, and it was not a happy experience. Furthermore, if retailing ultimately becomes concentrated in the hands of a small number of powerful retailers, effective state control will be hindered. In the era before Prohibition, the historian knows, concentration of power in the hands of distillers and brewers corrupted the relatively powerless political system. Today, powerful producers (both distilling and brewing are highly concentrated) exist side by side with powerful retailers (last year one prominent discount retailer sold 25 percent of all groceries in the United States). Should distributors be weakened or eliminated, the consequence will be to leave the state in a weakened position with reference to both powerful producers and powerful retailers. Nationally powerful producers and nationally powerful retailers would find vertical integration highly advantageous. That *state* governments would be effective regulators of such *national* businesses is doubtful. Even federal regulation might be problematic. Because the Twenty-first Amendment mandates *state* rather than *federal* regulation of alcohol, the prospect for *effective* government regulation of these large producers of

alcohol is less likely than in industries subject to greater federal regulation. Effective state regulation, control, and tax collection depends upon state power.

21. The Washington alcohol regulatory system set up in 1933 has worked well for more than seventy years. It is a system that has been effective. To abandon this time-tested system is to enter unknown territory. American history shows that finding a balance point for managing alcohol has never been easy. To disrupt the present balance is to risk returning to volatile and socially destructive patterns that have prevailed through much of American history. If the alcohol sales system is unmediated by distributors, Washington will find it more difficult to maintain control over powerful producers and powerful retailers.

22. Then, too, a small number of powerful retailers who can buy directly from producers will almost certainly gain market share and ultimately reduce the number of retail outlets. From a historical perspective, this outcome seems likely. The consequence of concentrating retail sales at low prices in a small number of relatively distant locations also needs to be carefully evaluated as to whether or not such a retail distribution system effectively serves the public interest. While there are no inherent public disadvantages in encouraging consumers to drive long distances to buy cheap milk, the same cannot be said for cheap alcohol. Some alcohol studies show that drinkers in their teens or twenties, whether above or below the legal drinking age of twenty-one, often have only small discretionary incomes, and, accordingly, these drinkers are especially sensitive to price. Drinkers under the legal age of twenty-one might be expected to gather in or near the parking lots of retailers who sell cheap alcohol waiting to be supplied by legal purchasers. These underage drinkers may very well drive long distances to get cheap

alcohol on short notice. Underage drinkers do not always act responsibly, which is why there is a legal drinking age. Unfortunately, these underage drinkers are precisely the type of drinkers who are most likely to drink and drive on the long way home. Given the history of drunk driving in the United States, it would be surprising if increases in drunken driving were not the result. There is something to be said for a public policy that encourages widespread placement of small-scale retailers to enable alcohol sales for home consumption to take place close to home. It is well established in the literature that home consumption creates less public drunkenness. There is also something to be said for a policy that promotes consumer choice by enabling retailers to carry easily products of small producers.

23. Furthermore, the idea that lower prices are beneficial to the public is a concept that is questionable when applied to alcohol. Historically, the period with the lowest prices, in the early 1800s, coincided with the highest per capita alcohol consumption, the greatest amount of public drunkenness, the most devastating social problems, and the backlash of the movement to ban alcohol. If lower prices do increase sales, then those increased sales risk raising both social and health issues. While there is abundant evidence that moderate drinking is not unhealthy for most people, abusive drinking is unhealthy. In recognition of the links between social and health issues and alcohol consumption, it has been official federal alcohol policy for some years, as stated by the National Institute of Alcohol and Alcohol Abuse, a unit of the National Institutes of Health, to reduce alcohol consumption. Because weakening regulation implies increased consumption, the promotion of sales through lower prices can be seen as a threat to public health and to the public interest.

24. In conclusion, the present system of rigorous alcohol regulation adopted by Washington in 1933 has worked well. It has worked better than the weak regulatory system that existed prior to Prohibition, in the age of the "tied house" saloons, and it has worked better than did Prohibition. The Washington system is designed to separate producers and retailers in order to diminish sales to underage drinkers and to inebriates; to allow competition within a stable economic environment that discourages illegal activities and promotes moderate drinking; and to foster efficient tax collection. Alcohol continues to present American society and Washington State with many challenges, but those challenges are not caused by the structure of the particular alcohol regulatory system that Washington has used since 1933.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3 day of June, 2005, I electronically served the foregoing to the following: David J. Burman, dburman@perkinscoie.com; David M. Hankins, davidh1@atg.wa.gov, and Michael D. Sandler, mike@sandlaw.com

Gina A. Mitchell

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